

ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

Wednesday, October 20, 2004

Federal Trade Commission Conference Center  
601 New Jersey Avenue, N.W.  
Washington, D.C.

The meeting convened, pursuant to notice, at 10:06 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson  
JONATHAN R. YAROWSKY, Vice Chair  
W. STEPHEN CANNON, Commissioner  
DENNIS W. CARLTON, Commissioner  
JONATHAN M. JACOBSON, Commissioner  
DONALD G. KEMPF, JR., Commissioner  
SANFORD M. LITVACK, Commissioner  
JOHN H. SHENEFIELD, Commissioner  
DEBRA A. VALENTINE, Commissioner  
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General  
Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

HIRAM ANDREWS, Law Clerk

SYLVIA BOONE, Administrative Officer

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity.

## P R O C E E D I N G S

MR. HEIMERT: I would like to call to order this meeting of the Antitrust Modernization Commission. It appears that there is a quorum of Commissioners, and Chair Garza, I will turn it over to you.

CHAIRPERSON GARZA: Okay. I would like to welcome the Commissioners to this meeting of the Antitrust Modernization Commission, and members of the public observing, we thank you for your interest in the Commission's activities.

Since our initial organizational meeting in early April, we have hired staff, some of whom are here and will be introduced to the Commissioners, established an office, launched a website, held our first public meeting, solicited and received comments from the public in regard to issues for further study and report, and formed several working groups to help further the work of the Commission.

In response to the Commission's requests for comments, we've received comments from at least 35 entities. In addition, a number of Commissioners have spoken with a diverse array of people representing

various interests, including representatives of consumer organizations, current and former enforcement officials, jurists, and others.

The focus of the Commission's initial activities has been to assist the Commission in the important task of identifying a set of issues for further study and report to Congress and the President. Over the next couple of months, the AMC working groups and staff will continue that work, preparing recommendations to the full Commission for deliberation and decision at a meeting on January 13, 2005.

It is anticipated that the AMC will meet in January and possibly again in February if necessary to determine the issues or topics for further study and report and that we will have work plans in place. We're studying many if not each of the issues and indeed will have begun work by February.

The agenda of this meeting is to receive a report from our executive director and general counsel, including on our new offices and our staff, and then to discuss what we expect the working groups to do over the next 60 days to facilitate the Commission's deliberations in January.

So with that, I will ask Andrew to give his report to the Commission.

MR. HEIMERT: Thank you. I'll report on several matters. The first thing I'd like to do is introduce members of our staff who have joined us since the last meeting. Bill Adkinson has joined the Commission staff as counsel.

CHAIRPERSON GARZA: Can you just raise your hand?

MR. HEIMERT: And if you can just stand up, Bill, or raise your hand.

MR. ADKINSON: Hi, it's nice to be aboard.

MR. HEIMERT: Bill comes to us from the Progress and Freedom Foundation, where he was senior policy counsel. He had previously worked at Wilmer, Cutler and Pickering and a couple of other places before that and has extensive experience in the antitrust world and particularly in writing. He's an editor for the Antitrust Law Journal. Is that the correct title, Bill?

Hiram Andrews has joined us as a law clerk. He previously was a paralegal at the Federal Trade Commission. He is now at the Georgetown University Law

Center evening division, so he's both becoming a lawyer and working for us, so he'll be helping us out with both lawyerly stuff and maybe a little less lawyerly stuff at times.

Two other staff members who are here today but haven't officially joined our staff but will be in the coming weeks: Todd Anderson, who is currently at Bingham McCutchen and will be joining us in early November as counsel as well; and Sylvia Boone, who is with the Commission on Ocean Policy. She will be our administrative officer, and she's currently in the same position at the Ocean Commission, the Commission on Ocean Policy. They are wrapping up their business in the next couple of weeks, and she'll be coming on board with her great experience on other advisory commissions and I'm sure will be a terrific addition to our staff.

One other, I guess, technically not a member of our staff, but we have retained Alan Meese, who is the Ball Professor of Law at William and Mary Law School. He will be joining us as a senior advisor and lending his extensive antitrust intelligence and academic experience to the Commission as it goes forward in working on its report.

So that's our staff at least for now. It's possible that we'll be adding additional people in the future, but I think that, at least for now, what you see is what you get in terms of the crew. And I'm excited, and I think they're all very eager and will all be great additions to the Commission.

Because we have staff, we now have offices that they can move into. They're not quite entirely set up yet. The address is on the website. I've sent it around to the Commissioners. The address is 1120 G Street, Suite 810. We are accepting correspondence there and mail. We're working on the phone system there to get that going, fax as well, but that should be up and running in the next week or two.

We've received over the past few weeks over 35 comments, public comments from entities and people. They're all posted on our website. I commend to you the comments on the website for those of you who want to see what others have said the Commission should look at, and I think the Chair will speak a little bit more about that in a few moments.

The Commission has also formed working groups. All the Commissioners have received both a

description of what the working groups will be doing over the course of the Commission's work and also in the near term in preparation for the January meeting in preparing recommendations for issues, trying to filter the issues to some degree and come up with a rationale for picking one over the other issue within the particular domains.

Commissioners received lists of the relevant issues for their particular areas. There's a list of both the working group assignments and what the working groups generally cover on the back table for the members of the public to take a look at as well as a short timeline describing what each of the working groups will be doing over the next couple of months.

That's the end of my presentation unless Commissioners have questions for me, which I'd be happy to answer.

COMMISSIONER KEMPF: What's the cross street on the offices?

MR. HEIMERT: It's between 11th and 12th. It's really on the corner of 12th Street and G.

COMMISSIONER KEMPF: Okay; and what's the suite number again?



MR. HEIMERT: It's 810.

CHAIRPERSON GARZA: Is there any particular security that people --

MR. HEIMERT: There is some security. They have a guard desk, but there's not an x-ray machine. We are sharing space --

CHAIRPERSON GARZA: There are no cards or anything.

MR. HEIMERT: To get into the suite itself, there are cards necessary. There's a doorbell outside.

CHAIRPERSON GARZA: Will each of the Commissioners get a card?

MR. HEIMERT: That can certainly be provided. We're sharing space with the American Meteorological Society or share a lobby with them, and we have part of the floor; they have the remainder of the floor.

COMMISSIONER VALENTINE: And if you call the phone after 5:00, you will get a voice mail message that says it's the meteorological society.

MR. HEIMERT: If you call before 5:00 as well. Part of the process of getting the phone set up will be so that you actually call the Antitrust Modernization Commission rather than their system, and

we're working on getting the system set up so that it will handle our phone lines separately.

CHAIRPERSON GARZA: Do they give you a weather forecast when they call?

[Laughter.]

COMMISSIONER CANNON: It's only off by one letter, Andrew, so --

MR. HEIMERT: That's right, so it's only going to create confusion.

CHAIRPERSON GARZA: So the phone system, you think that will be resolved soon?

MR. HEIMERT: I'm very hopeful that it will be resolved. In fact, today, I was told that their phone technicians will be there to set it up. Verizon has already put the lines into the building, and it's now an interior-wiring question.

CHAIRPERSON GARZA: Any other questions for Andrew?

[No response.]

CHAIRPERSON GARZA: Well, then, we want to discuss the working group process. As Andrew mentioned, everybody has received sort of the working group timeline that outlines in sort of broad terms

what the expectations are and the timing.

As it indicates, by December 17, we had hoped that the working groups would circulate recommendations for consideration by the full Commission in January. And so one of the things -- actually, what we wanted to talk about today was giving the Commissioners an opportunity to discuss issues before that next phase begins so that all the working groups can begin to do their work, and everybody is sort of on the same thought plane.

The Commission's charge is a broad one. We haven't been tasked with specific issues to study. Rather, we have our name, which indicates an intent to ensure that U.S. antitrust policy remains relevant to the current economy. We have our charge, which is to study and make recommendations to the President and Congress, and we have the benefit of Chairman Sensenbrenner's thoughts, and he, of course, was a sponsor and proponent of the legislation.

That makes the process of issue identification an important and indeed a critical part of our work. The Commissioners, of course, have had an opportunity to read the comments received, and the

staff has compiled and summarized those comments according to the working groups that we've organized into as they appear best to fit. The job of the working groups now, supported by the staff, is to consider the input and to formulate recommendations to the full Commission as to those topics or issues that should be studied further in the next phase of the Commission's work.

I think Andrew and I have some thoughts about what might be the most helpful format and way for the working groups to frame these issues for the full Commission, but I know from experience that the best way to get a really good method of going forward is to get the input from all of you.

And so, while I think our sort of working idea is that the working groups will, by December 17, have produced a written recommendation, I think all of the comments that we got from the public were quite good, but one in particular, I think the ABA Antitrust Law Section, was sort of a good model or format that we might consider following insofar as it basically, within our working groups, laid out the issue and suggested what it is that the Commission might consider

looking at and why.

But that's just a thought, and I think we ought to talk about it before we really launch, and I know several of the working groups -- some have already started; several will be meeting later today -- talk about what would be most useful for the full Commission to have the working groups focus on in terms of analyzing the input and making the recommendations to the full Commission for how we will go forward in the next period of our work.

And so with that, I will ask who has a thought, and Jon?

COMMISSIONER JACOBSON: Well, as you know, I think the first thing we need to address is, what criteria are we going to apply? What types of issues, without getting into the specific issues, are we going to address?

And I think with at least a consensus on that, if we can reach one, it will be easier for the working groups to come up with specific recommendations. For example, if we conclude that matters that are subject to correction at least easily through the common-law process are not appropriate for

Commission review, that would rule out a number of the issues that have been raised in the suggestions that we've received.

If, on the other hand, we conclude that we should add to the common law through study and recommendation and report on that issue, that would include those issues and perhaps rule out some others. So I think the first thing we have to do is at least discuss among ourselves what the criteria are at the outset for analyzing those issues, and I'm ready to spit out a few, if that's appropriate at this point.

CHAIRPERSON GARZA: Can I get -- before we do that, can I get John?

COMMISSIONER WARDEN: I think that to try to curtail issue scrutiny on the grounds that something is susceptible to a quick fix through the common law, so to speak, is a mistake, and in a sense, it puts the cart before the horse, because some issues, clearly, would be, if we proposed change, directed to the Congress and statutory action; others might not be susceptible of legislation at all, and instead, we might contribute commentary. And still others, it might be unclear at the outset whether they should be

addressed legislatively or through commentary.

So I don't think that we should restrict ourselves to either commentary or proposals for legislative action, and we can't really make the decision of what we're going to suggest in any particular instance until we've studied the issue.

Now, as to what issues we ought to study, it seems to me that the basic consideration other than we can't study everything in the world ought to be whether there is really a serious basis for — and I don't want to prejudge any issue, but whether there's a serious basis for thinking that change, be it legislative or otherwise, has been made by the people who've suggested that issue for study.

CHAIRPERSON GARZA: Debra?

COMMISSIONER VALENTINE: I don't necessarily want to throw this back at you or Andrew, and I'm not sure if any of us has made the effort to collect general principles from the comments that came in, but there certainly were a few among those comments. For example, the Antitrust Section of the ABA said you ought to focus on issues for which there is a broad consensus that some form of change might be beneficial

or would be beneficial.

Another group said it would be appropriate not to take on the entire set of tort reform and class action reform issues. Rather, those should be part of a broader package of issues that are going through Congress. I don't know that we need to adopt or endorse any of these in particular, but I think if we made sure that we were aware of which suggestions had come in thus far, that might be helpful in framing the way the groups are thinking.

CHAIRPERSON GARZA: John?

COMMISSIONER SHENEFIELD: I would like to associate myself with the first part of the remarks of John Warden. I don't think it makes any sense in the abstract and at this point to rule anything in or rule anything out, and I would like to keep open the possibility that some of the working groups might come back with a recommendation to consider an issue looking forward to commentary, if that's the right way to put it, a la the 1955 Commission report; others might come back with a recommendation for specific statutory fixes, and then, there might be some third or fourth possibility. So I would like maximum flexibility at



this point.

CHAIRPERSON GARZA: Steve, do you have a thought?

COMMISSIONER CANNON: No, I agree with that. I just think that we're pretty early in the process, Deb, and so, I would also endorse that theory.

CHAIRPERSON GARZA: Jon?

VICE CHAIR YAROWSKY: Well, yes, I mean, I would very much like to hear Jonathan's set of possible criteria, because I think we probably share a lot of those, all of us here at the table, and it just helps us think about it.

You know, the more you think about the antitrust laws, the more amorphous it becomes about what the universe is. I mean, sure, it's the statutory body; it's the evolving case law; that's why the framework of the antitrust laws were general in nature, with the intent that the courts fill it out, filled the content out. But, you know, in the last 15, 20 years, we've had a movement to kind of, you know, self-regulation through guidelines.

Hart-Scott-Rodino was part of that whole movement, I think, starting in the seventies about

giving pre-notice, thinking about these things ahead of time to sort of encourage self-regulation. Without making any judgment about that, I mean, those are issues also that we need to look at, I mean, whether we should be having much of the antitrust laws run through guidelines that are somewhat arcane.

So I think I share those, I think the general consensus here that we should wait, but I'm also, Jonathan, if I can elicit from you at some point, I'd love to hear your thoughts about a basic framework for that process.

CHAIRPERSON GARZA: And we will do that but let me get, Don, I think you wanted to say something, or did I -- oh.

COMMISSIONER KEMPF: No, the only thing I would say is the way to harmonize these things is to shift from a sort of exclusion to just prioritization.

CHAIRPERSON GARZA: Prioritization of the --

COMMISSIONER KEMPF: In other words, you don't need to exclude things, but you can sensibly prioritize. And for example, if there are things where there's a strong consensus, A, that something is amiss

and should be changed and B, as to how it should be changed, I think we could prioritize that and move that to sort of the front of the column, which might accomplish many things John was talking about.

CHAIRPERSON GARZA: Sandy?

COMMISSIONER LITVACK: Yes, I didn't understand Jon Jacobson to be suggesting that we necessarily preclude things but rather that there has to be some basis upon which we are deciding what to look at, and I think -- I guess what I'm saying is that Jon Warden's comments as well as Jonathan Jacobson's comments harmonize with each other.

I think, yes, we're not excluding, but let's talk about how are we determining what are the issues? I mean, what criteria are going into them? So I come back, and join Jon in saying help us, tell us what you think we should be -- how you think we should be approaching this.

CHAIRPERSON GARZA: Dennis?

COMMISSIONER CARLTON: I would endorse the view that right now, we should leave all avenues of inquiry open. My general sense is that guidelines or commentary can have enormous effect, as I think the

Merger Guidelines have, not only in influencing and letting businesses know how the government is going to act but also in influencing judges' thinking about antitrust.

Having said that, I think Jonathan raises a good point, which is you want to figure out what the consequences are of the law correcting itself — that's what he was talking about the common law — but as an economist, I think we should also keep paramount in our thinking what's the likelihood that market processes can correct what looks like an anticompetitive act very quickly?

And in trying to figure that out and what our role should be, I think it's very important not just to ask sort of what are theories of competitive harm, what are reasonable theories, but also to ask whether those theories are implementable and can be implemented by the courts. And in our analysis, I hope we will see not just whether there is a logic behind a particular theory but actually whether, in trying to implement it, courts are able to do it in a reliable way.

If it's impossible to quantitatively decide whether a theory is applicable, the court will be

making more errors than not and will be doing a greater harm. So I think that looking at the success of past theories or the courts in implementing theories is something that I would encourage us to be weighing when we're deciding what issues should have priority.

CHAIRPERSON GARZA: And I guess I'll throw in sort of my own two cents, and I think that we are probably all more on the same wavelength. I think I agree that no one at this point, I think, is interested in prematurely closing off anything from discussion, and we all, I think, have a sense that we want to identify those topics and issues that seem to have been a matter of debate for a while or that there seems to be a consensus needs to be focused on.

And what, at the end of the day, after we study it, we decide is most effective for this Commission to do, whether it's basically to comment on legislative fixes or to comment on the direction the law is or anything else I think is something that we deal with later in the day after we've identified the issues.

Having said that, it's, I think, a good idea, and that's part of why we called the meeting, to at

least discuss amongst ourselves and have an idea of what the various things, what the various roles the Commission could play and what various criteria could be in the minds of the working groups as we go about evaluating and weighing and sorting out those issues among the very many that we'll end up focusing our resources on.

So, Jon, since you raised the issue, maybe you'd like to start the discussion of those criteria.

COMMISSIONER JACOBSON: Thanks.

Let me mention a couple things: first of all, I think given the three-year life of the Commission and the fact that there are only 24 hours in a day and seven days in a week, I think there has to be a finite number of issues. I'm not saying a fixed number, but at the end of the day, we're only going to have hearings and really be able to address a finite number of issues.

And so, we do have to prioritize. And that's correct. I was not talking about absolute exclusion here. I'm talking about prioritization. And at least in my mind, prioritization needs to take into account the self-correcting aspects of the common law. And it

needs to do so for a number of, I think, very important reasons.

We've had the Sherman Act on the books for 114 years, and what at certain times have seemed to be absolute truths have turned out over time to be absolutely false, and some of those things that turned out to be absolutely false after being absolutely true have turned out later on to be possibly true in certain circumstances.

And, I mean, you could look at the whole evolution of exclusive dealing and tying doctrine from early common law, where it was *per se* legal to the mid-twentieth century, where it was virtually *per se* illegal, to theories of raising rivals' costs propounded by Steve Salop that have revisited some of the fundamental themes under it.

So, you know, I think for us to address issues like that and come out with a conclusion is in many cases going to be a short-term fix, and I think this Commission, because, you know, there aren't commissions like this every day, needs to have a longer point of view. And we need to address issues, in my judgment, that are going to address, you know, serious,

identifiable problems over the long run that cannot be corrected appropriately, often through the benefit of greater learning through the common-law process.

And that's why in terms of my priorities, I would shy away from most of the substantive issues that have been raised, and we can get into some specifics, but there have been, you know, a number of comments saying, you know, we should articulate the standards for what is exclusionary conduct under Section 2 of the Sherman Act. That's a tough issue. And if we come up with something, it could be obsolete in two years; it could be obsolete in six months.

And ultimately, that is going to be decided by the Supreme Court in any event, unless we come up with some legislative fix for that issue, which I think has all sorts of problems, because then, you really are locking in a doctrine that cannot be fixed through the common law process. So that's just my point of view on the general subject.

The areas that, you know, I think we should make sure we're focusing on, issues that we can grasp and understand, not, you know, broad, amorphous concepts, issues that impact a lot of constituents in



the national economy, issues, as you indicated, the ABA has pointed out where there's a fairly reasonable consensus that a problem exists.

But in terms of the prioritization, I would like for us to focus on things that we can make recommendations to the Congress, in particular, for fixes that — and many of them may be more procedural than substantive but fixes on the institutional structure and procedural aspects of the law rather than those issues that, you know, have been the product of common-law decision-making; you know, right and wrong. But ultimately, over time, the courts tend to move in the right direction.

CHAIRPERSON GARZA: Can I just ask a question? Jon, would you restrict in your recommendations to Congress, or would you think that there might be a role for us to play in recommending to the enforcement agencies, for example, directionally that they should do something or look for —

COMMISSIONER JACOBSON: I certainly wouldn't rule that out in terms of the prioritization. I think the highest priority should be legislative fixes if we determine, you know, any are necessary. I'm confident

that we will over the course of our time, but certainly, recommendations to the agency, certainly another one of the issues raised has been, you know, the second-request process, you know, are there things that can be done to make that process more efficient than it is today. And so, certainly, that would be included.

And there may be issues where the Supreme Court has just gotten it, you know, deeply wrong that are susceptible to quick solutions without undoing or interfering in the common-law process. One possible example is the presumption of market power in tying cases from possession of a patent or copyright, which no academic would support today. But —

CHAIRPERSON GARZA: John?

COMMISSIONER WARDEN: I agree and enthusiastically so with virtually everything Jonathan said. I think the common-law adjudication system of giving meaning to the broad generalities of Section 1 and Section 2 and, for that matter, Section 7 of the Clayton Act has served us well, despite the fact that in hindsight, we can say there were periods of gross error in the administration of the statutes, and I

think it is important to look at procedure, extremely important, and that's something that is susceptible, in many instances, of statutory change.

I would not -- I still don't, however, want to rule out either what you just referred to, the possibility of suggesting enforcement policy or revisions of guidelines or commentary on the common law. There are some areas that would be a thicket from which we would never emerge; I agree with that. Others, we might be able to do something useful on.

And my final comment is that while I agree with you and Don and Debra that if there is a broad consensus in the antitrust community that there is a problem, it needs fixing, and here's the means by which it should be fixed, that entitles that issue to priority in our consideration. But I think that it would be an abdication of our responsibility if we declined to look at issues because there is no existing consensus or we fear that it will be difficult to develop one in the immediate future.

CHAIRPERSON GARZA: John?

COMMISSIONER SHENEFIELD: I think we may be laboring over a problem here as to which there's less

than meets the eye. It seems to me that there are going to be issues where it makes sense, if there is a consensus on this Commission, for the Commission to say something about the direction in which the common law is headed.

That's going to be hard, because there are going to be very different views, and the exclusionary conduct is a perfect example of that one. I daresay that might split the Commission 50-50. But there may well be other areas, such as *Parker v. Brown*, where we might decide that the active supervision prong or the affirmative declaration prong has been interpreted in the wrong way, and the Supreme Court has got it wrong, basically, and it ought to head in some different direction.

And I think it would be useful, not an interference in the common law but an enrichment in the common law for this group of — without humility — experts to say something about it and make some recommendations. In other areas, I agree with you: if we're talking about Section 3 of the Robinson-Patman Act, that's not something as to which you need to spend a long, you know, a great amount of time with

commentary. I think it's pretty clear what ought to happen, and we ought to just go ahead and make a recommendation as to that.

I think it would also be helpful if, for instance, we conclude that the states have enacted laws that are unhelpful to our competitive economy either by way of enforcement of the antitrust laws or closing the antitrust laws off from applicability to certain sectors of the economy that we say something about those.

Even though this is a federal commission and those are state laws, and it's unclear how any of this would actually make a difference in the real world, I still think it's helpful. But my sense is that that will vary from subject matter to subject matter and proposal to proposal.

CHAIRPERSON GARZA: Debra?

COMMISSIONER VALENTINE: I think we're verging toward consensus, and I agree with Jon, John, and John. So there.

But seriously, another way of looking at this would be to try to prioritize those things and this involves two related sets of issues. First, those on

which there is a consensus that there is a problem and second, those on which we are likely to get a consensus on the result. I do think the commissions, historically, that have been the most effective have been the ones that have acted with unanimity or near unanimity.

And so, I think whenever we can find issues on which there is general agreement as to the proper way forward, we should take advantage of the opportunity to address those. I also think that it would help us immensely if we were to try to limit the number of issues on which we focused, and I would be interested in opening a discussion about whether working groups would be willing to prioritize five, and from that, we would even narrow down further.

Five issues for six working groups means there are still 30 issues. And that's probably too much for any group of heads to bite off and aim at some ultimate resolution. We don't need to name a number now, whether it's 10 or 15, but I just think if we address 50 issues, we are bound to meaninglessness and 500 footnotes in history.

CHAIRPERSON GARZA: Jon?

VICE CHAIR YAROWSKY: Yes; I'm not going to retread what I think is the emerging consensus. I think a lot of what we may want to look at is structural. That's just my point of view.

Jon has kind of described in a very elegant way kind of the dynamic. Human conduct doesn't really change. That's fairly stable. But you're talking about this process of common-law development, which is a very dynamic development, very nuanced development. We can look at the doctrines.

But I also think that one great thing about a commission like this or any kind of commission like this is to stand back and have some perspective and look at the structural configuration. That will include whether it's -- how the enforcement agencies work, guidelines. I'm very interested and excited about, without showing any predilection, about regulated industries. John Shenefield mentioned *Parker v. Brown*.

Okay; that is a doctrine; that is an interactive effect with the natural market, marketplace that we want to preserve, but there's a certain carve-out there for government, you know, it all flows from

sovereign immunity, but whether it's federal or state, that's a structural issue.

Immunities and exemptions from the antitrust laws: that had nothing to do with Sections 1, 2, or 7, John. Those were supposed to be generic applications. Suddenly, for various policy reasons, you have some exemptions and immunities that have cropped up over time. I think we ought to look at those.

Regulated industries: that's very exciting and very challenging, I think, because it's kind of off in a hybrid. And I know, at least from my limited experience dealing with Congress, that that is something that they care very much about. That doesn't mean we have to devote the whole Commission's work product to that, but I think they would wonder what we saw as a structural set of issues that arise from that, especially industries in transition.

So I hope that we can get to where Debra has indicated. Maybe through each of our informal working groups, we can get a reasonable number of issues that we can finally decide that that would be it, but I'm very hopeful in looking at these structural issues and respecting and doing no harm to kind of certain other



developments that have worked pretty well.

CHAIRPERSON GARZA: Anyone else want to —  
Don?

COMMISSIONER KEMPF: The only thing I would add is that if we are, indeed, able to prioritize and have some things about which there is a consensus, both as to the problem and the cure, I think we should also consider not waiting until the end of our term to suggest it to whomever but should think of making some interim suggestions and recommendations.

COMMISSIONER JACOBSON: I just want to make a comment on the observation from Debra Valentine. We're down to two Debs, but we still have —

CHAIRPERSON GARZA: But we still have many Johns, yes.

COMMISSIONER JACOBSON: And there are a number of working groups. I think some of them may come up with just one issue, and I would hesitate, you know, to make sure that we have five if in that subject matter, there's really only one. I think if you go more than five — by my count, there are actually eight of these things; we have 40, and I think that that would be a lot.

So I agree that we -- I think five is actually a very good number to shoot at, but if it's less than five, I think that's pretty good, too.

CHAIRPERSON GARZA: Oh, fine, yes.

COMMISSIONER JACOBSON: And just a ditto to what Jon Yarowsky said. You know, our first duty is to do no harm, and I think that has to be front of mind and, you know, has to be our guiding principle.

CHAIRPERSON GARZA: I think we can get a consensus on that.

You know, in the working groups, I think perhaps rather than setting a hard number for the working groups, this discussion can be a good guide for us, and we obviously all have in mind that in January, say, we're going to have to come up with a sensible agenda for ourselves, and we will have to make some calls at that point as to how we're going to approach our work, and so, I think the working groups probably, without setting an artificial limit, will have in mind providing appropriate guidance to the full Commission in their areas, their topic areas as to what should be the top priority given all the various things that have been discussed here today, both the, you know, the

importance that the issue appears to have for people, the potential for developing a consensus on our view and recommendation; the effectiveness of any recommendation that we might make in actually solving the issue, all of those things that you discussed hopefully will be taken into account by the working groups as they put forward to the full Commission their recommendations on each of these issues.

Is there anything else that anyone wanted to discuss about the work of the working groups or the work product that we're hoping to get out of the working groups in December or how you can interact with the staff or any other question?

COMMISSIONER KEMPF: I had some questions. I'm not sure these are appropriate, but let me just tee them up.

One, we have Commissioner Majoras in a gray status on the sheets, and I'm not -- my question is, do we know what's going to happen, how it's going to resolve itself?

CHAIRPERSON GARZA: Well, Commissioner Majoras is no longer a Commissioner on this Commission. She's resigned and withdrawn from the Commission, so we

have a vacant Commission slot right now.

COMMISSIONER KEMPF: My recollection of the statute, it provides that —

CHAIRPERSON GARZA: Within 90 days.

COMMISSIONER KEMPF: — the same process that led to her selection will be repeated as to the replacement; is that correct?

CHAIRPERSON GARZA: That's right. And in the statute, I think there's a 90-day — someone correct me, Andrew?

MR. HEIMERT: It's 90 days, but she's already resigned prior to the 90-day termination provision.

CHAIRPERSON GARZA: Right, and I don't know what the effective date of her resignation is right now.

MR. HEIMERT: September 15th, if my memory serves me correctly.

COMMISSIONER KEMPF: As far as the working groups, I am not as happy as I would like to be with the way that it has worked out. And I don't fault anybody for that procedure. I thought it was a good one when we went into it. It was — everybody sort of send in your things you'd like to be on.

Some people had more ambitious stuff; some of us, some of us didn't turn anything in, and we were assigned to stuff that seemed logical for us, so -- but where we've ended up was one Commissioner is on two, and one is on eight, and it sort of makes me feel uncomfortable saying well, gee, maybe I should be on more. And I'm wondering whether we'd be better served if everybody was on three, but everybody could go to all eight.

CHAIRPERSON GARZA: Just first of all, if there's anything that you want to do in terms of changing or adding, you should just tell Andrew, because it really is the case that if somebody didn't respond, they were just assigned to something, but that's no hard rule.

I mean, the working groups are meant to be a device to help us proceed. There's nothing strict about it. And I think just in terms of the numbers, we didn't really try to impose a number. Some of us, just by the natures of where we are in our careers and our practice, frankly, have more time than others to devote to things.

Now, at the end of the day, in effect, you

are all on all eight working groups, because you're on the Commission. And so, all of us at the end of the day are going to have to address all of these issues. The working groups, though, we want to make them working groups, and so, if someone volunteered to be on all of them, frankly, you know, we were happy to do that.

And just others can pull out, I'm reluctant to take anybody off a working group, but I'm happy to put anybody on a working group if they're not on it right now.

COMMISSIONER KEMPF: Well, I would feel personally comfortable being on -- I'll pick a number, say, three, because if I'm on eight, I feel I have some obligation, and I know I won't shoulder it if I'm on eight.

CHAIRPERSON GARZA: Right, right.

COMMISSIONER KEMPF: So I think limiting me to three is a good idea for me to do to myself.

At the same time, if something comes up on one of the other eight, I'd like to know their schedules, when they're meeting.

CHAIRPERSON GARZA: Sure.

COMMISSIONER KEMPF: So if I wanted to attend, I could, and at the same time, I also feel a bit uncomfortable when I say to myself, well, somebody else is going to be on eight; do I feel I ought to be on eight, just to make it look like you're shouldering your share of the burden?

I don't know. When I looked at the thing, I just felt uncomfortable.

COMMISSIONER SHENEFIELD: I'm sorry to cause the discomfort.

[Laughter.]

COMMISSIONER SHENEFIELD: May I offer you my personal support and dispensation for any lack of comfort you feel? And if I can help you in any way by keeping you informed of what goes on in some of the other working groups, I'd be happy to do so.

CHAIRPERSON GARZA: But I think it is a good idea, and Andrew, would you make sure that we do that, that everybody is aware of the time and meetings and just the general thing for the working groups?

MR. HEIMERT: I'd be happy to do that going forward, yes.

COMMISSIONER VALENTINE: And I think there is

one other thing we might think about. There were three groups that have fewer members than the others, and those three should certainly either feel free to reach out to one of us if you need more assistance, or I would be happy to volunteer for one of those three if somebody needs a little extra elbow grease.

CHAIRPERSON GARZA: And, Andrew, there are, in fact, three working group sessions this week, right? There are two this afternoon and --

MR. HEIMERT: I think there are at least that if not two or three on Friday. I don't have my calendar in front of me.

CHAIRPERSON GARZA: Right, so do you mind getting together with Don and others and just letting them know what --

MR. HEIMERT: I'd be pleased to.

VICE CHAIR YAROWSKY: Just to follow up on one of Don's suggestions, maybe we could just, at the beginning of every week, just send out a calendar that everyone can see.

CHAIRPERSON GARZA: I think in your weekly --

MR. HEIMERT: I'll add that to the weekly update.



CHAIRPERSON GARZA: Great, and we'll do that. And Don, if there's any other issue, just raise it with Andrew, and hopefully, that will help, just knowing when the committee meetings are.

COMMISSIONER KEMPF: Let me ask one other technical question, and that is, I visit the website frequently, but I haven't seen it since you posted the public commentary stuff, and my question is, does that include -- there's a series of interviews going on. Have we got anything up on the website on those? Or what is the plan if we don't?

MR. HEIMERT: No, the interviews are not posted on the website. We wanted to ensure candor in doing those interviews and so told people we were interviewing that we would not be publicizing broadly precisely what they spoke about. Instead, their comments have been incorporated into the working group list of issues that was circulated.

COMMISSIONER KEMPF: Okay.

CHAIRPERSON GARZA: But to further your question, Don, the people we've engaged in outreach with, the identities are a matter of public record and will be a matter of public record.

COMMISSIONER KEMPF: My issue — I knew that, but my issue was, you know, how do we get the benefit of that? And I think Andrew was —

CHAIRPERSON GARZA: The staff is — okay. All right; is there any other business that people want to — Dennis?

COMMISSIONER CARLTON: I want to say one thing in terms of priorities. I think it's important not just to, you know, be surveying people about what they think. Obviously, people who have a lot of experience are important; what they think and what they identify as the key issues.

But oftentimes, what you find from surveys is that people are reporting what they think is their reaction. But if you actually go back and look, sometimes, it's not borne out by the data. There have been a few, not a lot, studies of the effectiveness of the antitrust laws, and I think one of the useful functions we could perform in coming up with a list of priorities is also identifying where we think our antitrust laws have worked well and where there is a consensus that it's worked well and that there's evidence that it's worked well and also evidence where

it's worked poorly.

Now, I can think of some examples of both, but there are many issues that have been raised that I know people are, quote, concerned about, where the evidence is very weak, because people haven't studied it, but opinions are very strong and often split depending on who you survey. And I think it is very important for us, when we're identifying an issue, to explain on what basis we're identifying -- is there empirical evidence to suggest it's a problem? Is there empirical evidence to suggest that it is being administered poorly by the courts?

And there are a few such studies, and maybe that's one of the types of studies we could do in helping us, you know, come up with our recommendations.

COMMISSIONER WARDEN: I agree that if such information is available, it's extremely relevant, and if it was feasible within the time frame and budget that we have to develop specific additional empirical information, that's fine, but that may be biting off a lot. I mean, you ought to think about that and have ideas for the rest of us.

COMMISSIONER CARLTON: Yes, well, one

question I have is I know some of the antitrust agencies, the government agencies, both the FTC and DOJ are always concerned with trying to get, especially the economists, of trying to do empirical studies of the effectiveness of the antitrust laws, and I'm wondering what is -- I assume we can not only draw on their published studies, but to the extent that there's ongoing work at either the FTC or DOJ on such a topic, what is our ability to get access to that information?

CHAIRPERSON GARZA: Well, and two things, one thing I would say, I think the notion of trying to shed light on issues, that is, people have -- there's this broad hue and cry that something is an issue, but the question is well, if we were to look at the data, would we all agree at the end of the day it really is an issue, what has been the impact?

I think that's part of what our charge is, essentially. I think that's a contribution we can make. Now, we may not make that contribution prior to issue selection; it may be that that's something we say we've selected this issue, but one of the things we want to do is to gauge how much of a problem has it been, for example, and the question is how can you do

that and whether this Commission can do that or whether we have to borrow help from the agencies or suggest things that we think the agency should carry out.

I think that's going to be part of what we have to think about. It may be that in our three-year term and given what we have in our limited budget, we can't do it, but I suppose that one of the recommendations should be the FTC or somebody should study this issue.

So I think it's a valid point, and I think it's something we should be considering as part of the charge of the Commission.

I don't know if anyone else has any —

COMMISSIONER SHENEFIELD: I have a question.

The American Bar Association's Antitrust Section has very helpfully and constructively offered to do sort of background papers and the like if we would find that useful. In your area of sort of empirical work, I wonder if there's some similar organization in the economics profession that would be willing pro bono to do some helpful background work for us if asked.

COMMISSIONER CARLTON: Well, there is an

Economics Section of the Bar Association, so a number of economists belong to the Antitrust Section of the ABA, and perhaps they would be interested.

There is, in the American Economics Association, not a subgroup devoted specifically to antitrust, although there will be sessions at the upcoming meetings, and there will be a roundtable on antitrust, and perhaps one of the issues can be, you know, to solicit people's views on what studies are available and would they be willing to do such studies?

CHAIRPERSON GARZA: Dennis, when is the roundtable?

COMMISSIONER CARLTON: At the American Economics Association, they sponsor at their annual meetings panel discussions, and there's one panel discussion I know about because I'm on it that will discuss antitrust topics, and that's typical of the annual meetings that there usually are one or two sessions devoted to antitrust. Whether people would be willing to do something for free is another question.

CHAIRPERSON GARZA: Well, they're economists.

COMMISSIONER CARLTON: Maybe the graduate students would be delighted to get a thesis topic, but

whether that would move quickly enough for our purposes, I don't know.

But I was just wondering, do we have knowledge of ongoing studies at either the Department of Justice or the Federal Trade Commission about such things?

COMMISSIONER VALENTINE: I think what we could do there is ask, and we want to do that through you, Deb and Jon; that probably is most efficient.

And then, I think what would be the issue is that often, the agencies need clearance from OMB to be able to gather X amount of data and take Y amount of people's time to conduct this study. Once they're authorized, it sometimes is pursuant to certain confidentiality restrictions, and the agencies may or may not be able to share all the data with us, but they may well be able to if it is sufficiently anonymized. Alternatively, we could just meet with whoever is doing it.

COMMISSIONER CARLTON: I was specifically talking about ongoing studies that we may not know about.

COMMISSIONER VALENTINE: Right.

COMMISSIONER KEMPF: And we do have a \$4 million budget, so we don't need to necessarily do everything pro bono.

COMMISSIONER CARLTON: Right.

COMMISSIONER KEMPF: It may be some stuff where if there's no pro bono expertise available, we might pay for it ourselves.

COMMISSIONER SHENEFIELD: Some of it is appropriated. I don't think we have —

CHAIRPERSON GARZA: We don't have the \$4 million in a pot but —

VICE CHAIR YAROWSKY: Not yet.

Dennis, can I — I think absolutely, we need to bring in the empirical side to this during even the working groups, but certainly what I always thought was once we actually get an agenda, and we vote on what we ought to look at, I think that's an important component of any hearing that we have, once we have the topics crystallized to some degree, and that's why we probably have to get a head start to get some folks focusing on this, but I think that's critical that we don't just have a conceptual discussion in an open hearing.

CHAIRPERSON GARZA: Can we ask the staff to



do that, then, Andrew? Can you, in the meantime, see what you can learn about what the agencies may have ongoing?

COMMISSIONER JACOBSON: Well, we should also certainly get -- the Bureau of Economics, as you know, regularly puts out papers.

CHAIRPERSON GARZA: Yes.

COMMISSIONER JACOBSON: Let's just get a list of them.

COMMISSIONER SHENEFIELD: But let me push Dennis a little further. I know economists don't like to work for free, and the reason is obvious. But there are some very high-priced lawyers working for free through the ABA Antitrust Section. Is there a way conveniently to find out what the status of the economic literature is on selected topics, for instance, the Crandall and Winston studies, have those been criticized? What can we find out from the economics profession on those subjects, and is there any work that could be done?

COMMISSIONER CARLTON: I think one of the recommendations I was going to make to the staff in some of our meetings is that we start gathering some of

that economic literature, and I know not all of it but a large fraction of it, since I just revised my textbook, and I was trying to cite a lot of that literature.

But there certainly are people who I know to contact who would be able to supply us with lists of studies that have occurred and that are, you know, well-regarded. Surprisingly, there are fewer studies than you would hope, unfortunately, but I think they are important, and there's been a continued recognition to do more and more of those, and I know both the FTC and DOJ have recognized that. That's why I brought that up.

The only other thing I'll mention is there is now and probably you all are more familiar with it than I am, there is an international organization, the International Competition Network, and they have been concerned with trying to compare across countries different antitrust laws and trying to compare their effectiveness, and unfortunately, I don't think they've produced any studies, although they have a lot of interesting data, and one of the reasons they were providing this data was in the hopes that people would

do the studies. And I have not kept up with whether anyone has done anything with that data, but that would certainly be interesting.

And also, I now Europe, the European Commission, has a number of economists and antitrust lawyers who I also think are trying to figure out what direction to go. So sometimes, if we're trying to figure out what's a good direction to go, comparing it to someone who's going in a different direction, and maybe they had disastrous consequences, that's very informative to us.

So looking sort of more broadly than just what do people think about administration in the United States but whatever they think about administration in other countries, although that's a little tricky, because countries differ a lot, but that's another area we can look at. But I will -- I can certainly give the, you know, the staff some references.

You know, the other thing, and I have done this, the National Bureau of Economic Research, to which I belong, is a not-for-profit organization, and they have an industrial organization group, and one of the things I was thinking about is just sending out --

and those are empirical economists interested primarily in industrial organization, many of them in antitrust, and, you know, I'd be happy to send out a notice to all of them explaining our interest on this Commission in all empirical studies about the effectiveness of the antitrust laws.

And, you know, although it's true, economists don't like to work for free, academic economists regard working on interesting topics as consumption, so -

[Laughter.]

COMMISSIONER JACOBSON: Just a brief semi-personal observation, which is I think we're better off looking at sources like ABA, the American Economic Association.

I think the American Bar Association Antitrust Section is a good resource. We should let them decide what resources or committees are best suited for the topic. I think going directly to the Economics Committee of the Antitrust Section, just on personal experience, that is a thinly populated, heavily overworked committee that owes me on some of my ABA stuff quite a bit of work, so I just keep that in mind. And the FTC Bureau of Economics and the

economists at DOJ, I think are very valuable resources.

CHAIRPERSON GARZA: Dennis, there's a task force, the ABA has a task force to basically interact with the Commission, with AMC, and it may be that — I think your request would be a good one to work with Andrew and funnel directly to them.

COMMISSIONER CARLTON: Okay.

COMMISSIONER CANNON: And I was going to add, I think the Antitrust Section is a great example, frankly, of comments that we got from all — a wide variety of groups that I thought were all very helpful, and I think that's good to note as an example but not as an exclusive —

CHAIRPERSON GARZA: No, no, no, not as an exclusive.

COMMISSIONER CANNON: — course of conduct. Obviously, I thought we got some great comments from all sorts of groups.

CHAIRPERSON GARZA: I was thinking about it in terms of sort of the format.

COMMISSIONER CANNON: Sure, right.

CHAIRPERSON GARZA: And I think we can talk later, and we don't have to make a decision at this —

certainly don't have to make any decision right here. But I think it would be helpful for the staff, at least, to think about a kind of a format for the working groups to shoot at which wouldn't be a straitjacket.

COMMISSIONER CANNON: Sure.

CHAIRPERSON GARZA: It would just ensure some uniformity and make sure that what we get as a Commission will be useful to us.

COMMISSIONER CANNON: Right.

COMMISSIONER JACOBSON: Could we get some idea of what your thinking is in particular and Andrew's and John's on what the functions of the staff are going to be? Because I don't have a good idea.

CHAIRPERSON GARZA: Well, the staff is there to support you, and so, for example, when you -- let's take the working group phase, okay, and you're discussing in your working group how you're go parcel out these issues. You may say, well, I would like -- I've got these comments, but I would like to know, essentially, you know, what has been the -- what legislative proposals have been made, and how far did they get? Andrew, what has the -- or Bill or Todd, go

find out what resources are there, what does the FTC and DOJ, what are they doing, if anything, to address this at this point? What have they done recently.

You know, I know this area pretty well, but there are some things that I'm not sure I've been kept up on: what's the latest -- anything that's basically going to help to inform the working group's decision-making, instead of you going out and getting that, basically, you give it to the staff, and the staff does that. So that's one part of what the staff does.

The staff will also, I think, assist the working groups in the reports and -- the recommendations and putting that together. By December 17, the staff is going to get out to each of the Commissioners to take with them on their holiday breaks and prepare for the January meeting a notebook, I assume, that will have the recommendations of the various working groups and what we need to prepare for the deliberations in the January 13 meeting. They'll be doing that.

In connection with that, I think they'll be working with the working groups to help put those recommendations together, basically to take them, to actually put them, you know, together on paper; to make

sure there's some uniformity to them and essentially put that package together.

I mean, those are two things that I see the staff doing, and Andrew and John, are there any -- particularly Andrew, since I'm putting it on all on your shoulders and the staff's shoulders but --

MR. HEIMERT: I think that's a good description of some of what the staff will be doing. Obviously, there are a lot of organizational details that have to be taken care of for any meeting and for the Commission generally, and I know I've been working a lot on that and I hope less so once things get going more smoothly.

But going forward throughout the entire process, it will be essentially to assist the Commissioners with the work and information they want to have and to know for this but don't have the time themselves to gather and also to help coordinate across Commissioners so that we don't have to put 12 Commissioners together in a room on a very frequent basis, which is just simply not feasible, yet still get the Commission's work going forward expeditiously so that we can meet our April 2007 reporting obligation.



CHAIRPERSON GARZA: And I think, Andrew, it would be important for you, then, to make sure that everybody's expectations are understood, and so, since you have a lot of working groups to do things for, you need to keep on top on what's doable and not, and to the extent there's something a working group needs, and your staff is stressed, I think we need to talk about that with the working group.

It may be that associates at law firms or something could help and assist, but in order to make sure that we have that assistance, I think you need to have a constant discussion with the working group and realistic assessment of what you can accomplish with what we have now, and let's make sure that we manage the expectations and manage to December 17 and make sure everything we have, everything we need, we have.

COMMISSIONER CARLTON: Actually, that raises a question that I had, Deb. If I wanted to, say, use someone to assist me to gather the literature or to talk, I assume -- is that okay?

CHAIRPERSON GARZA: From the staff, you mean?

COMMISSIONER CARLTON: No, not from the staff. In other words, suppose the staff is overworked

and --

CHAIRPERSON GARZA: Right, right, right.

COMMISSIONER CARLTON: -- I have a graduate student or someone; I assume that's okay.

CHAIRPERSON GARZA: That's fine.

MR. HEIMERT: That's okay, and I think, Deb, you had previously circulated a sample volunteer letter for such work that might be useful to have.

CHAIRPERSON GARZA: Yes, and maybe you could send that out and I could --

MR. HEIMERT: And I'm happy to send that out again if you need it.

The Commission, by statute, is permitted to accept gifts, and that would constitute a gift of services and goods, so that would certainly be something that would be -- the Commission could accept and would not pose any problems.

COMMISSIONER JACOBSON: But that has to be documented with a piece of paper?

CHAIRPERSON GARZA: Well, what we have done --

MR. HEIMERT: It's wisest, I think that that be done.

CHAIRPERSON GARZA: Right; we'll circulate it

again. What we have done is, and I will just be straight with you; the reason I had done it initially is when I, to start up, when I used the time of associates in my law firm, I was conscious of -- I didn't want there to be an issue whether that went out of my time, because we all have time issues, I know, limitations on how many days, and so, I used that as a -- in consultation with GSA as a method to make plain that this person was volunteering their services to the Commission, wasn't doing it for pay, wasn't doing it as my associate being directed by me but as someone who was volunteering.

So we have a form, and Andrew will recirculate that, and if you'd like, you can use that with folks who -- I don't want to be overly formalistic, but sometimes, it helps to just have an understanding going in. And it also documents for us who helped us, so at the end of the day, when we want to have our list of everybody who's contributed assistance, we can go look at those letters.

COMMISSIONER SHENEFIELD: How and when do you expect to make use of Professor Meese?

CHAIRPERSON GARZA: I'll be meeting with him

hopefully very soon. Unfortunately, he couldn't come up for this meeting, but I think he will be useful as an advisor and like the staff advise any of the working groups as they work forward.

He's also there to be an advisor to the staff on issues. He's not going to be, obviously, a regular staff person, but he is a big thinker and somebody who brings a lot to the table who will be helping and writing and thinking and planning who may have, I think, hopefully ideas to help with the working groups in terms of once issues are identified, what are good ways to attack those issues, what are resources; just generally as a resource.

His time will be less available to us, obviously, than the staff's.

COMMISSIONER SHENEFIELD: Is it pro bono?

CHAIRPERSON GARZA: No, it's not. He's on a contract basis.

COMMISSIONER JACOBSON: I have to say he has the single most impressive resume I've seen in a long time, but it also exhibits a particular ideological bent in one direction, and I personally have a concern that, you know, our advisors be ideologically neutral

or at least counterbalanced.

CHAIRPERSON GARZA: Right.

COMMISSIONER JACOBSON: And his resume, as stunningly impressive as it is, at least raises that question.

CHAIRPERSON GARZA: Well, I'll tell you, you know, I've been out beating the bushes looking for what you might say is like the Fox Network, fair and balanced.

So I talked to a number of people who might be identified sort of on the other end. But I will tell you that in talking with all of those folks, every one of them spoke very highly of Alan, and while you see an ideological bent, I think all of them expressed comfort that he would not be ideological in this.

Everybody, you know, to some extent, I have an ideological bent. And so, one --

COMMISSIONER JACOBSON: Yes, but we were appointed by legislators in the Congress for that reason.

CHAIRPERSON GARZA: One thing I just want to say is he wasn't appointed or asked to come on because of an ideology. Let's put it that way. And I was

careful to bring someone on who basically nobody on the other end of the spectrum was aghast about and all sort of endorsed and thought it was great.

Now, having said that, I have been looking for people who you might consider to be balancing Alan, and so far, I haven't found anyone who has the time.

COMMISSIONER JACOBSON: Walter Adams is old and dead.

CHAIRPERSON GARZA: Obviously, we've talked about this before, but if there is someone who you can identify that would like to work with the Commission, that would be great, and you just let me know. I have feelers out. There were a couple of people I really would have liked to have brought on, but they had obligations with books they were writing, classes they were teaching, various obligations, and they weren't able to do that.

But, you know, there's no secret agenda.

COMMISSIONER JACOBSON: I wasn't remotely suggesting.

CHAIRPERSON GARZA: Okay.

COMMISSIONER JACOBSON: I really wasn't.

COMMISSIONER KEMPF: I have never met anybody

in the field who has spent any amount of time in it who doesn't come away with some ideological tendencies, so I don't think -- and I think he has a fair and balanced resume.

[Laughter.]

CHAIRPERSON GARZA: But to your point, he really is a quite impressive person, and I think we are fortunate to have him involved.

COMMISSIONER CANNON: I was going to say, Deb, it seems to me now we're really poised to truly get to work. And I've got to tell you, I have to really commend you and Jon and Andrew for -- there are a lot of details it takes to get to this point and a lot of administrative details and headaches to resolve, and, you know, I commend you for that, and it sounds like we're ready to go.

COMMISSIONER JACOBSON: I just have one last question, and that was a good place to -- so I apologize.

Mechanically, how should we propound staff requests? Should we send all of them to you? Should we be calling individual members of the staff separately?

MR. HEIMERT: I think at least for the time being, it's probably easiest to channel them through me. My expectation is once Todd starts, we'll have principal responsibilities assigned to either Todd or Bill for each of the working groups, so I think at that point, it will be easier just to channel through them. But until that point, Bill is really responsible for all of them, along with me, so there's no -- going through me or Bill or both of us is fine, and we'll develop that over time so it becomes more efficient and sensible.

CHAIRPERSON GARZA: And I will just add that we actually hope to be adding to the staff. We are in discussions with the Department of Justice about bringing on an economist, and I saw your head pop up just then, and maybe another lawyer, and that will be on the same basis that we initially had Andrew or have had Andrew, which is that they will be detailed to us, so they won't be reporting to the DOJ anymore, but they will be -- DOJ will be picking up the tab, to put it inelegantly.

COMMISSIONER JACOBSON: Do we have the money to pay for the staff that we've retained?



CHAIRPERSON GARZA: Yes. We've been very careful not to hire people where we can't pay them.

All right; shall we adjourn the meeting? All right; the meeting is adjourned, then.

[Whereupon, at 11:14 a.m., the meeting was adjourned.]